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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application by SBC Communications Inc.,)	
Southwestern Bell Telephone Company, and)	CC Docket No. 00-65
Southwestern Bell Communications Services,)	
Inc. d/b/a Southwestern Bell Long Distance)	
for Provision of In-Region, InterLATA)	
Services in Texas)	

**SUPPLEMENTAL DECLARATION OF
C. MICHAEL PFAU ON BEHALF OF AT&T CORP.**

April 26, 2000

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**FOR PUBLIC INSPECTION
FCC DOCKET NO. 00-65
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**SUPPLEMENTAL DECLARATION OF
C. MICHAEL PFAU ON BEHALF OF AT&T CORP.**

I, C. Michael Pfau, first duly sworn upon oath, do hereby depose and state as follows:

1. I am the same C. Michael Pfau who co-sponsored the Declaration of C. Michael Pfau and Sarah DeYoung On Behalf Of AT&T Corp. ("Pfau/DeYoung Declaration"), which was filed in CC Docket No. 00-4 on January 31, 2000. I also sponsored the Reply Declaration of C. Michael Pfau On Behalf Of AT&T Corp. ("Pfau Reply Declaration") in that docket. Both of these declarations addressed SWBT's Texas performance measurements, performance data, and self-enforcement commitments. The Pfau/DeYoung Declaration sets out my qualifications to address performance measurements and related matters.

I. Scope and Summary

2. In this supplemental declaration, I address SWBT's recent reported performance across the full set of measurements for which it currently is reporting data in Texas. I also address some recent regulatory penalty payments reported by SWBT and

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the implications of those payments for the Texas self-enforcement plan that SWBT has proffered in support of its public interest showing. AT&T addresses SWBT's recent reported performance on DSL-related measures, UNE loop measures, and particular OSS measures in other supplemental declarations.

3. SWBT's initial 271 application was based on performance data through October 1999. SWBT's reported performance since that time not only continues to show substandard results, but also reflects a significant increase in the percentage of measurements for which SWBT reports violation of parity and benchmark standards, when compared to the results that SWBT was reporting on lower volumes of CLEC activity in the summer and through September 1999. Throughout the four months ending February 2000, SWBT has reported noncompliance with parity or benchmark standards for 1 out of every 5 of the "Tier 2" Texas measures, on average, reported on a statewide basis. These are the performance measures which the Texas Public Utility Commission ("TPUC") has described as the "most critical, customer and competition-affecting measures."¹ SWBT's failure rate on these critical measures -- exceeding 15% when the data is reported on a geographically disaggregated basis and hovering around 20% when reported on a statewide basis -- is three to four times the failure rate to be expected from an ILEC providing nondiscriminatory wholesale support. SWBT is failing too many measures, too often, to meet the statutory standards incorporated in checklist item two and other checklist items.

4. SWBT's repeated Tier 2 performance failures for CLECs in the aggregate now have risen to the level that SWBT has been required to pay over eight hundred

¹ CC Docket No. 00-4, Evaluation of the Texas Public Utility Commission at 107.

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thousand dollars in sanctions to the Texas State Treasury under the remedy plan that was made a part of the "Texas 271 Agreement." The payments further confirm that SWBT's performance is currently not meeting the minimum expectations that should be attained by a section 271 applicant. Furthermore, the assessments themselves reveal material flaws in SWBT's remedy plan that weigh further against any finding that granting SWBT's application for 271 relief would be in the public interest.

II. SWBT's Recent Data Show Deteriorating, Unacceptable Performance

A. SWBT Reports Parity and Benchmark Violations On 1 Out of 5 Critical Measures

5. An ILEC that is providing genuinely nondiscriminatory performance to CLECs should achieve a passing grade on approximately 95% of the Texas performance measures, based on the statistical tests being used by SWBT. Quite the contrary to holding SWBT to a standard of perfection, this standard allows SWBT to fail to achieve the TPUC-approved minimum level of performance on individual measures, so long as the frequency of those failures remains below the level expected due to random, uncontrollable events.² For the five months ending February 2000, however, SWBT has reported a failure rate hovering around 20% on the Texas Tier 2 measures, calculated on a statewide basis. Not only is the current failure rate four times that which

² See Declaration of Colin Mallows ¶¶ 8-9. The Texas Commission has set the critical z-value so that SWBT will only be considered out of compliance when the difference between the performance reported for CLECs and the performance for its retail operations is sufficiently large to create a 95% confidence level that the difference is not due to random variation in the data. Across a large number of measures, then, SWBT might be expected to report failures on 5% even if it provides nondiscriminatory support. However, "as the percentage of violations grows larger [than 5%] across a sizeable number of measures, we can conclude with increasing confidence that these parity violations are not occurring by chance." *Id.* at ¶ 9. Expecting a 95% passing rate would by no means hold SWBT to an "A" standard of performance. Rather, it simply requires SWBT to regularly achieve at least a "C" across the range of required wholesale support functions. SWBT's recent data reports show passing rates that are nowhere near the expected level for an ILEC providing genuinely nondiscriminatory service.

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should be demonstrated by the applicant, but it also represents a distinct deterioration from the approximately 15% failure rate SWBT reported in the late summer 1999.

When SWBT reports its performance on a geographically disaggregated basis, its reported passing rate for the last four of those same five months has been in the low 80% range, declining to 81.0% in February. The chart below shows both of these sets of results:

Tier 2 Pass Rate ³	August	September	October	November	December	January	February
Statewide	84.2	84.6	78.6	79.3	79.4	80.0	81.9
Geo. Disagg.	88.5	87.1	86.2	83.9	82.7	82.9	81.0

Thus, over the last five months SWBT has been reporting failing performance on roughly 1 out of every 5 results for these “most critical, customer and competition affecting measures,” on a statewide basis, and its geographically disaggregated results now have declined to almost that same level. Whether the monthly result on either scale is closer to 15% or 20%, the conclusion is the same: SWBT is reporting far more performance failures, on what SWBT and the TPUC agree are important measures, than should be expected from a party seeking to demonstrate section 271 compliance.

6. AT&T provided an analysis of SWBT’s reported performance for the months November 1999 through January 2000 in a March 6, 2000 *ex parte* submittal, a copy of which is included as Attachment 1 to this affidavit. SWBT’s reported February performance provides further support for the analysis set forth in that *ex parte* and the

³ The pass rates for the months through January 2000 are taken from SWBT Hit or Miss Reports previously provided to this Commission. The February data are taken from Attachments 2 and 3, which AT&T has prepared based on data reported by SWBT, as described in paragraph 6 and note 4 below.

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conclusion that SWBT is committing too many parity and benchmark violations to be

considered in compliance with the Act. To update that analysis, I have provided in Attachment 2 a summary of SWBT's reported statewide performance results for the months November 1999 through February 2000 and in Attachment 3 a corresponding summary of SWBT's geographically disaggregated performance data.⁴

7. SWBT's February performance showed no material change from previous months' performance. SWBT reported an increase in its compliance rate on Tier 2 measurements from 80.0 in January to to 81.9% in February, when the data is reported on a statewide basis. On the other hand, on a geographically disaggregated basis, the data show a continuing decline in performance, this month from 82.9% to 81.0%. The table above and the attachments to this declaration make clear that for at least four months

⁴ A summary of SWBT's reported statewide data (for all Texas CLECs) is provided in Attachment 2. SBC reported this statewide data in its March 23, 2000 *ex parte* submittal to the FCC, which is posted on the SBC website, www.sbc.com. AT&T prepared Attachment 2 by manually transferring data from the March 23 *ex parte* report to a spreadsheet. Using the geographically disaggregated SWBT data for all Texas CLECs reported on SBC's CLEC website, sbcclec.com, AT&T prepared the summary in Attachment 3 in the same fashion. AT&T was required to summarize the data in this fashion, because until last Friday's *ex parte* filing by SBC (April 21, 2000), neither SBC nor SWBT had provided to the FCC, nor otherwise made public, a "Hit or Miss Report" including February data, to AT&T's knowledge.

SBC's April 21st *ex parte* submission contains geographically disaggregated and statewide Hit or Miss Reports for SWBT for the three months ending March 2000. SBC's failure to include this data in its application prevents CLECs from being able to analyze the data properly or fully comment on it under the time frames established by this Commission. SBC provides no explanation for why it did not include this material in its application (for example, the February statewide hit or miss report) or, alternatively, why it did not simply postpone filing its second application until the data were available (for example, the March data). In any event, while it is for this Commission to decide whether the data will be given any weight, I note here that in the limited time that AT&T has had to review SBC's latest submission, it has become apparent that the totals presented in those Hit or Miss reports contain minor variations from the AT&T totals reflected in Attachments 2 and 3. The differences, which AT&T is investigating as of this filing, appear primarily attributable to a dozen or so z-scores which SWBT included in its Hit or Miss Reports but not in its posted website data or the statewide February data reported with the March 23 *ex parte*. These additional results were either mistakenly omitted from the February data as initially reported, or mistakenly included in the Hit or Miss Reports that accompanied last Friday's *ex parte* submission. In any event, the differences between the Hit or Miss Reports and the summary of SWBT's reported data in Attachments 2 and 3 are not material. (In the Hit or Miss Reports that accompanied SWBT's April 21 *ex parte*, SWBT reported a February Tier 2 pass rate of 83.4% for statewide data, and 81.3% for geographically disaggregated data). SWBT continues to report failing well over 15% of the Tier 2 measures under even the most favorable self-reported data contained in its statewide Hit or Miss Report.

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SWBT has been reporting a failure rate on these key measures that is *three to four times* greater than the 5% rate to be expected from an ILEC who is providing truly nondiscriminatory wholesale support. And, it will take more than a return to the 12 to 15% failure rates of August-September 1999 for SWBT to establish that it is providing nondiscriminatory access to checklist items and a meaningful opportunity to compete. Sustained performance around the 95% mark, rather than the 85%, should be seen before concluding that SWBT has irretrievably opened the local marketplace to competition.

8. Not only is SWBT's overall rate of performance failures too high to support a finding of nondiscrimination, SWBT's recent reported performance failures also are widespread, cutting across a variety of important measures. Attachment 4 is a list of the 46 measurements for which SWBT has reported noncompliance during at least two of the three months ending in February (46 measures showing multiple failures out of 329 total measurements reported on a statewide basis – Tier 1, Tier 2, and diagnostic). Many of these measurements showed violations for all three months. Among the Tier 2 measurements (statewide reporting) with 3 consecutive violations through February were many that are crucial to competitive entry, particularly UNE-P, UNE-L and DSL: PM 13 – order process % flow through (LEX); PM 17 – billing completeness; PM 35 -- % trouble reports within 10 days – UNE loop/port combinations (POTS), no field work; PM 56 -- % installed within 3 days – unbundled BRI loop; PM 58 -- % missed due dates – 8 dB loop, (no field work), DS1 dedicated transport, DSL loop; PM 59 -- % trouble reports within 30 days – 5 dB loop, BRI loop, DSL loop; PM 65 – trouble report rate – 8 dB loop

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with test access, 5 dB loop with test access; and PM 67 – mean time to restore, dispatch required – BRI loop with test access and DS1 loop with test access.

9. Indeed, during the last 4 months SWBT has reported noncompliance at least once with over one-third of the performance measurements for which it has reported z-scores (statewide data). Attachment 5 lists all of those measurements, beginning with the 16 for which SWBT has reported four consecutive months of noncompliance. Attachment 5 lists 109 measurements (Tier 1, Tier 2, diagnostic) for which SWBT has reported one or more failing results between November and February, out of a total of 306 (November) to 327 (February) measurements for which it calculated a z-score.

B. SWBT's Recent Performance Fails Even the Minimum Test Agreed Upon By SWBT and the Texas Commission

10. In the April 1999 Memorandum of Understanding that SWBT negotiated with the TPUC, SWBT committed to supply the TPUC with three months of validated performance data prior to filing a 271 application with this Commission. SWBT further committed that it would show compliance with benchmark or parity standards on 90% of the Tier 2 measurements (with at least 10 data points) for two of the relevant three months. MOU at 38. SWBT has met neither obligation. The vast record amassed in connection with SWBT's initial application shows that SWBT has repeatedly changed and restated data to cure deficiencies – a clear indication that the data was not and is not sufficiently validated. Furthermore, SWBT never satisfied the second test relating to the adequacy of Tier 2 performance, and, rather than coming closer to meeting the standard, is now even further from satisfying it. Indeed, SWBT has never reported a passing score

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on 90% of its Tier 2 measurement results in a single month, and its monthly pass rate for some time has been closer to 80%.⁵

11. Failing to deliver the requisite level of performance that might allow competition to survive, SWBT has instead sought to manipulate the standard. SWBT has advanced an extraordinarily lenient application of the Texas 90% Tier 2 test, under which it calculated an "overall" result by looking at the results for each individual measurement, determining whether that measurement showed a passing z-score in two out of the three months, and then calculating the percentage of measurements that passed this two-out-of-three month test. SWBT's approach should be rejected.⁶ Nevertheless, it is significant that, even under this extra-forgiving interpretation, SWBT has failed to achieve the minimum performance level. SWBT fails even when its forgiving version of the test is applied to the most recent three months for which data was available at the time of its new April 5, 2000 application. SWBT passed only 79.6% of its Tier 2 measurements for any two of the three months ending January 2000, according to SWBT's own Hit or Miss Reports for statewide data. For the three months ending February 2000, the corresponding rate for statewide Tier 2 measures was 82.2%. For geographically disaggregated Tier 2 data, SWBT reported passing 85.3% during any two out of the three

⁵ Attachments 2 and 3 show that SWBT has reported higher pass rates on the "Tier 1 only" and diagnostic measures that the TPUC regarded as less important than the Tier 2 measures. This fact helps to explain SWBT's shift away from discussions of its Tier 2 performance to presentation of an all measures pass rate in its filings before this Commission. See *Dysart Aff.* ¶ 79.

⁶ This interpretation of the 90% Tier 2 test introduces extraordinary leniency into a test that, even under more strict interpretations, allows SWBT to fall below the standard of nondiscriminatory performance set in the Act. AT&T has previously set out the flaws and limitations of the 90% Tier 2 test, and in particular SWBT's preferred approach to application of that test. See Attachment 1 at 5-6; see also TPUC Project No. 16251, Comments of AT&T Communications of the Southwest, Inc. On SWBT's Proposed "Memorandum of Understanding" 31-33 (April 28, 1999), SBC App. C, Vol. 101, Tab 1512; TPUC Project No. 16251, Comments of AT&T Communications of the Southwest, Inc. On Three-Month Performance Evaluation For SWBT 12-13 (November 1, 1999), SBC App. C, Vol. 135, Tab 1934.

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months ending January 2000. For the three months ending February 2000, the

corresponding rate for geographically disaggregated data was 84.8%. *See* Attachments 2 and 3.

12. In sum, based on the data for the three-month period relevant to SWBT's new application, SWBT indisputably has failed to pass the overall performance test that it and the TPUC had agreed upon. The TPUC, for its part, has been conspicuously silent on the 90% Tier 2 test that it negotiated with SWBT, after failing to reach agreement on application of the test at its November 4, 1999 Open Meeting.⁷ This Commission should be extremely reluctant to approve an application where the state commission has established an objective test of nondiscriminatory performance, the ILEC has accepted that test, failed that test, and the state commission has offered no compelling justification

⁷ AT&T pointed out that SWBT's performance through October could not have satisfied the 90% Tier 2 test, given its level of performance failures through September that had been noted at the November 4, 1999 Open Meeting. *See* AT&T Communications of the Southwest, Inc.'s Comments Regarding SWBT's October 1999 Performance Data and Staff's Previous 3-Month Data Evaluation at 3, n. 1 (December 10, 1999), SBC App. C, Vol. 139, Tab 1996. However, the TPUC included no discussion of that test during the December 16, 1999 Open Meeting at which it voted to support SWBT's initial FCC application. AT&T showed in both initial and reply comments here that SWBT was failing performance measures at a much higher rate than should be expected, and noted SWBT's failure to satisfy the 90% Tier 2 test that had been set by the TPUC. Pfau/DeYoung Decl. ¶¶ 76-87; Pfau Reply Decl. ¶ 11-12. The TPUC, however, did not address SWBT's failure to meet the 90% Tier 2 test in its comments or reply comments to this Commission in Docket No. 00-4. Indeed, the TPUC made no mention at all of the performance test that it had fashioned. More recently, AT&T has raised the issue of SWBT's deteriorating overall performance before the TPUC. PUCT Project No. 20400, AT&T Communications of Texas, L.P.'s Request For Commission Review of SWBT's "Backsliding" (March 2, 2000). The TPUC denied AT&T's request for immediate hearing, but ordered that the matter be addressed during the six-month review of SWBT's performance measures, and specifically directed that the issues raised by AT&T's backsliding filing be addressed at the performance measures review workshop on April 17, 2000. At the April 17 workshop, AT&T requested the opportunity to make a brief presentation on this subject, even offering to confine its presentation to the implications of SWBT's decline in performance for evaluation of its new 271 application. However, the TPUC denied AT&T the opportunity to make any presentation on backsliding issues at the April 17 workshop and deferred the subject until May, offering only that AT&T might make a written filing sooner to address SWBT's February performance for purposes of the Commission's evaluation of the new 271 application. AT&T has done so, urging the TPUC to examine the recent data and hold SWBT to its minimum performance commitments. *See* TPUC Docket No. 20400, AT&T Communications of Texas, L.P.'s Comments Regarding SWBT's Continued "Backsliding" And Review Of SWBT's New 271 Application (April 24, 2000).

for disregarding the test after the fact. If an ILEC fails to meet even the minimum

performance commitments it has agreed upon with the state – here, very lenient commitments under SWBT’s construction of the test – when the very large carrot of long-distance entry is directly before it, there is no basis for concluding that it can and will deliver the nondiscriminatory wholesale support that the Act requires.

C. SWBT’s Performance Data is Unreliable

13. One caveat should accompany this discussion of SWBT’s recent performance. The discussion above takes SWBT’s reported data at face value. In fact, SWBT’s data has not been shown to have the reliability or integrity that should be a prerequisite to the use of any self-reported performance data in support of a section 271 application. On the contrary, a long and continuing history of retroactive changes in data, internal contradictions in data reported on related measures, and a host of other problems have raised most serious questions about the accuracy and reliability of SWBT performance data. The concerns about SWBT data reliability, and the lack of meaningful validation of SWBT data to date, which have been raised by the Justice Department as well as by AT&T and other CLECs, need not be repeated here. *See* DOJ Evaluation at 5-7, 17, 47; Pfau/DeYoung Decl. at ¶¶ 14-72; Pfau Reply Decl. at ¶¶ 2-10 and Attachment 1 (listing reliability issues). It will suffice here to note that serious data reliability and integrity issues persist and continue to appear. Clearly, recent UNE-L reconciliation activity identified that errors continue to be made by SWBT both in reporting the number of cutovers that make up the denominator for the coordinated conversion measures and in identifying and classifying premature disconnects and other outages. That same reconciliation activity also confirmed that remedial steps agreed to as a result of the

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reconciliation efforts last fall have not been implemented, or have not been implemented successfully.⁸

14. Furthermore, in its very recently posted reports of data through March 2000 on the CLEC website, SWBT noted that it has made a “complete revision” of February reports for PMs 16 and 19, regarding the accuracy and timeliness of usage records transmitted to CLECs, and that “most CLECs were affected.” SWBT also reported that its February results for PM 70, interconnection trunk blockage, had “erroneously reported no sampled calls for February for any CLEC in Arkansas, Central & West Texas, Oklahoma, and South Texas.” SWBT further reported that it had corrected January and February data for South Texas for two other trunking measures, PMs 70.1 and 72.⁹ SWBT also now has acknowledged that the conversion of its performance measures reporting to Microsoft Access, which is intended to provide additional mechanization and address security and data integrity issues observed by Telcordia, will not be completed before July 1, 2000.¹⁰

⁸ See Supplemental Declaration of Sarah DeYoung. See also TPUC Project Nos. 16251, 20400, AT&T’s Letter to ALJ Regarding Learnings From Data Reconciliation Process (April 18, 2000) (attaching “UNE-L Coordinated Cutovers Action Item List – April, 2000 Reconciliation of Coordinated Cutover Performance Measures and Outages – AT&T Recommendations”); Joint Supplemental Affidavit of Rhonda Huser and Sarah DeYoung (April 21, 2000); Joint Affidavit of Mark Van De Water and Robert Royer (April 21, 2000); TPUC Project No. 16251, Joint Affidavit of Rhonda Huser and Sarah DeYoung (April 14, 2000) (confidential, contents under seal).

⁹ SWBT reported these items under its “Web Site News As Of April 20, 2000, under “Corrections to Data/Reports.” See <https://clec.sbc.com/chlecb/restr/pm/gomeasurements.cfm>.

¹⁰ Telcordia also has confirmed that it will not commence its review of SWBT’s Access-based performance data reporting until after July 1. Separately, the Missouri Public Service Commission, in recognition of the reliability issues that surround SWBT data, has issued a Request for Proposals to perform a validation of the accuracy of SWBT performance data by qualified audit firms, with a scope of work that goes well beyond the limited, highly subjective performance measures review conducted by Telcordia in Texas. Until a validation such as that contemplated by the Missouri RFP has been properly conducted and successfully completed, SWBT’s performance data lack the reliability to support such an important conclusion as a finding of checklist compliance.

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III. SWBT's Recent Tier 2 Penalty Payments Confirm Poor Performance And Reveal Weaknesses in the Remedy Plan

15. I have previously pointed out several reasons why the Texas Performance Remedy Plan, contained in Attachment 17 of the T2A, will neither be strong enough in its deterrent effect, nor automatic enough in its application, to provide the type of self-enforcement mechanism that can satisfy the public interest criteria that this Commission set out in BellAtlantic. See Pfau/DeYoung Decl. at ¶¶ 113-69; Pfau Reply Decl. at ¶¶ 14-17. Recent payments by SWBT confirm the weakness of the Texas remedy plan in application, even as they further confirm the unsatisfactory quality of SWBT's performance.

16. SWBT very recently reported that it has made Tier 2 penalty payments to the state in the amount of \$ 472,600 based on its performance for the three months ending January 2000, and \$ 407,000 for the period ending February 2000.¹¹ Under the Texas plan, Tier 1 liquidated damages payable to individual CLECs are to provide the first line of defense against backsliding. A narrower set of measures are subject to potential Tier 2

¹¹ SWBT's payments for January were due March 16 under the T2A. However, SWBT did not post any Tier 2 payments on the CLEC website (which the T2A also requires it to do), until after AT&T had publicly questioned why no payment had been reported, given 20 Tier 2 measurements on which SWBT had reported 3 months of consecutive performance failures through January 2000. See AT&T Communications of Texas, L.P.'s Comments On Six Month Performance Measures Review and Matrix of Recommendations at 6 (April 6, 2000) (hereafter "AT&T Six Month Review Comments"). This sequence of events raises questions as to whether SWBT simply was late in publicly reporting the payments, or whether SWBT was late in making the payments. With a 271 application pending, either fact is cause for concern. Nor has there been disclosure, or opportunity to examine, how SWBT calculated the amount of these Tier 2 payments, in order to determine consistency with the remedy plan. An additional question is raised by the fact that, when SWBT first posted its \$472,600 payment for January, it also reported a \$ 75,000 payment for performance through December, where it previously had reported "n/a". More recently, SWBT has deleted the \$ 75,000 December payment from its website report, reverting to "n/a" under the column for Tier 2 payments for that month. As with the underlying data itself, SWBT's report of Tier 2 payments now has been subject to retroactive adjustment that raise questions about the reliability of the report. Because the subject of backsliding was not addressed during the April 17 workshop, these questions about how "automatically" SWBT is making its Tier 2 payments will go unanswered at least until the TPUC workshops resume May 1.

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“assessments” (penalties), payable to the State Treasury, and Tier 2 payments arise only after *three consecutive months* of parity or benchmark violations based on SWBT’s performance *for CLECs in the aggregate*.

17. Thus, while four hundred thousand dollars a month would be a small price to pay for continued monopoly control of the local telecommunications market, the fact that SWBT has been required to make those payments represents a serious performance failure -- namely, SWBT now has violated several Tier 2 measurements, based on performance for the CLEC industry as a whole, for three and four consecutive months. For the three months ending January, SWBT had reported consecutive violations for 20 Tier 2 measurements.¹² Because Tier 2 payments do not arise until SWBT has committed three consecutive violations on a measure, based on industry-wide performance, SWBT has ample opportunity to cure problems before they become sufficiently widespread and chronic to trigger a Tier 2 payment. With its section 271 application pending, SWBT has had more incentive than it ever will again to be sure that its performance failures do not rise to the level that triggers a Tier 2 payment. SWBT’s Tier 2 payments reflect a volume of chronic, unremedied, industry-wide performance failures that should not be regarded as acceptable performance from an applicant for section 271 relief.

18. At the same time, SWBT’s Tier 2 payments reveal or confirm flaws in the remedy plan that SWBT has adopted, flaws that must be remedied before SWBT’s plan could support a public interest determination. Perhaps most striking is the contrast between SWBT’s reported Tier 1 and Tier 2 payments. Tier 1 liquidated damages are to

¹²

AT&T Six Month Review Comments at 6.

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provide relief directly to the CLEC injured by substandard SWBT performance, and they

apply from the first month of failure forward. Tier 1 provides for escalating damages with repeated performance failure. Tier 2 provides for no escalation, but applies a single schedule of penalty quantities, regardless of the duration of a performance failure. *See* T2A, Attachment 17, § 8.2 (liquidated Tier 1 damages and Tier 1 assessment tables).

19. Over the same four months that SWBT accumulated \$ 879,600 in Tier 2 penalties (or \$ 954,600, if there was in fact a December \$ 75,000 penalty), SWBT has reported only \$ 12,750 in Tier 1 liquidated damages payments. Indeed, through January, it had only paid \$3250; and in December the Tier 1 payment was only \$450. Given the widespread adoption of the T2A that SWBT has claimed, this pattern should have been reversed, if Tier 1 was operating as intended. By the time SWBT accumulates several chronic performance failures vis-à-vis the industry as a whole, it must have provided failing performance to many individual CLECs and should have been paying substantial Tier 1 damages. The opposite has been true. The fault may lie in the Tier 1 damage quantities, the per occurrence scheme, SWBT's implementation of the plan provisions that call for payment of Tier 1 damages on low transaction volumes, or a combination of these and other factors. Regardless, the contrast in SWBT's reported Tier 1 and Tier 2 payments leaves no doubt that Tier 1 currently has no meaningful effect.

20. SWBT's recent performance and Tier 2 payments also reinforce the concern that a penalty mechanism which operates only after three months of consecutive violations offers too little, too late, particularly where the liquidated damages terms are having so little impact. They also highlight the lack of escalation in the Tier 2 payment scheme for continuing violations. Without escalating penalties when discriminatory

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performance persists, a steady state Tier 2 payment of \$ 400,000 to \$ 500,000 can

become the potentially acceptable cost of providing wholesale service with 20 chronic performance failures, rather than remedying those failures.

Conclusion

21. The evidence presented by AT&T in CC Docket No. 00-4 exhaustively detailed SWBT's failure to produce reliable performance data and results that demonstrate a quality level sufficient to support findings of checklist compliance. The evidence also demonstrated material flaws in the Texas remedy plan for enforcing performance requirements. SWBT's performance data for the months of November 1999 through February 2000, and the related performance penalty payments that SWBT has reported, confirm that SWBT is not providing the nondiscriminatory support for CLECs that the Act requires and that the self-enforcement plan under which SWBT operates in Texas will not create adequate incentives to achieve or maintain the performance that the Act requires.

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on April __, 2000

A handwritten signature in cursive script, appearing to read "Michael J. Smith", is written over a horizontal line.

ATTACHMENT 1

EX PARTE OR LATE FILED

COHAN, SIMPSON, COWLISHAW & WULFF, L.L.P.
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March 6, 2000

Written Ex Parte

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

MAR 06 2000

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FEDERAL COMMUNICATIONS COMMISSION
U.S. DEPARTMENT OF THE TREASURY

Re: Application by SBC Communications, Inc. et al. for Authorization To
Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-4

Dear Ms. Salas:

We represent AT&T in proceedings on local competition and section 271 matters before the Texas Public Utilities Commission ("TPUC"), and have consulted with AT&T in connection with the above-referenced proceeding. We are providing this letter on behalf of AT&T in response to SBC submittals of performance data generated after its application had been filed at this Commission, and in response to related reply comments by SBC and the TPUC.¹

Fairly viewed, SBC's post-application data weigh heavily against its application. SBC's aggregated performance data for January 2000 continue to show that SBC is reporting far too many performance failures to satisfy the statutory standard – wholesale support that is nondiscriminatory and provides a meaningful opportunity to compete. Through January 2000, SBC has violated applicable standards on 1 out of every 5 key measures in Texas for each of the past four months. SBC now is reporting substantially worse performance for CLECs than it was reporting prior to obtaining the TPUC's endorsement of its application. SBC's January data also provides its own rebuttal to the SBC and TPUC reply comments that attempt to explain away performance failures on such critical items as access to DSL-capable loops and coordinated conversions.

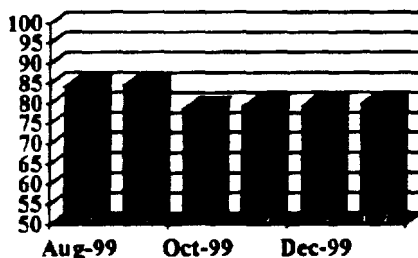
¹ The Commission's existing rules and procedures plainly forbid acceptance or consideration of SBC's post-application data, as well as reply comments offering new explanations for poor performance. Accepting such material into the record converts the determination of checklist compliance into a moving target in which the incumbent controls the data and presses controversial factual assertions that have gone untested during state fact-finding proceedings. To the extent such materials may be included in this record, however, the Commission should consider this response as well.

Analysis of SBC's Post-Application Data

SBC's post-application data present a picture of worsening performance, even while operating under an extraordinary incentive to demonstrate good performance – a pending application for long distance authority before this Commission. SBC has not answered how or why this Commission could reach a conclusion that it is providing nondiscriminatory access to interconnection, UNEs, or OSS with commercial performance data that show so many parity and benchmark violations. SBC's application rested on performance data through October that violated numerous key measures; and its post-application data show that SBC has provided even more seriously degraded service to CLECs since the record before the TPUC closed on December 16, 1999. Moreover, the Texas remedy plan is plainly having no deterrent effect on SBC's declining performance – SBC's CLEC website reports that SBC paid total Tier 1 damages of \$2050 in November and \$400 in December 1999.²

SBC Consistently Fails 1 Of Every 5 “Critical Measures”

An ILEC that is providing genuinely nondiscriminatory performance to CLECs should achieve a passing grade on approximately 95% of the Texas performance measures, based on the statistical tests being used by SBC.³ For the four months ending January 2000, however, SBC has reported a failure rate of 20% or more on the Texas Tier 2 measures, calculated on a statewide basis, as the chart below illustrates:



² “Southwestern Bell – Texas: Tier 1 and Tier 2 Liquidated Damages Payments,” January 2000 updated files (<https://clec.sbc.com/>).

³ See Declaration of Colin Mallows ¶¶ 8-9. The TPUC has set the critical z-value so that SBC will only be considered out of compliance when the difference between the performance reported for CLECs and the performance for its retail operations is sufficiently large to create a 95% confidence level that the difference is not due to random variation in the data. SBC's post-application data report passing rates that are nowhere near the expected level for an ILEC providing genuinely nondiscriminatory service. And SBC does not pass even the more lenient test that the TPUC and SBC agreed upon in the April 29, 1999 Memorandum of Understanding, and then abandoned.

SBC Monthly Pass Rate on Tier 2 Measures (statewide)

Month	August	September	October	November	December	January
Tier 2 pass rate ⁴	84.2	84.6	78.6	79.3	79.4	80.0

According to the TPUC, these are the "most critical, customer and competition affecting measures." TPUC Comments at 104-05. Yet SBC's performance has fallen to the degree that, for the last four months, it has passed no more than 80% of these critical measures, failing one out of every five. SBC's failure rate on Tier 2 measures is *four times* the failure rate to be expected from an ILEC providing nondiscriminatory service.

Other SBC Reports Confirm SBC's Deteriorating Performance

SBC's post-application data is reported a number of ways, but all point to the same conclusion – SBC is violating parity and benchmark standards too often, and its performance is getting worse, even with its application pending before this Commission. For example, the TPUC further divided SBC's Tier 2 measures into "Low," "Medium," and "High" categories. SBC's performance on Tier 2 High measures has shown a similar decline in recent months:

Month	June	July	August	September	October	November	December	January
Tier 2 High pass rate ⁵	91.3	91.8	89.5	88.6	87.2	83.2	81.2	83.2

SBC's failure rate on Tier 2 High measures has more than doubled – from 8.7% to 17.8% -- between June 1999 and January 2000. Over this same period of time, the number of Tier 2 High measurements with enough data for SBC to calculate a z-score

⁴ Source: Aug.-Oct. Tier 2 pass rates manually calculated from Hit or Miss Report – August through November 1999 (statewide) attached to the SBC Ex Parte Letter from Austin Schlick to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-4 (February 11, 2000) (hereafter "SBC 2/11/00 ex parte"); Nov.-Jan. as reported in the Hit or Miss Report – November 1999 through January 2000 (statewide) attached to the SBC Ex Parte Letter from Austin Schlick to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-4 (February 18, 2000) (hereafter "SBC 2/18/00 ex parte"). AT&T provided a handout illustrating SBC's recent Tier 2 failure rate during March 1-2, 2000 meetings at the FCC, a copy of which is included here as the first slide in Attachment 1. That attachment contains copies of all three AT&T performance data handouts from the March 2 meetings. Copies of those handouts already have been filed with the FCC. AT&T Ex Parte Letter from Frank Simone to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-4 (March 2, 2000).

⁵ These results are illustrated in Attachment 1 at Slide 2 (identifying SBC website files from which these data are taken). These results are based on SBC's geographically disaggregated data, as reported on SBC's CLEC website.

also has increased – from approximately 30% of the total Tier 2 High measurements in June of 1999 to over 40% today. In other words, as SBC has reported on an increasing number of measures, its *rate* of failure has increased. And SBC still is reporting a pass or fail result on fewer than half the total potential Tier 2 High measurements.

SBC's geographically disaggregated results for its complete set of Tier 2 measures – High, Medium, and Low – show the same pattern. SBC has failed more than 10% of these critical measures every month going back to at least June 1999, and it has reported markedly worse performance since the TPUC's December 16, 1999 vote to support SBC's section 271 application before this Commission. Since that date, SBC has reported data for the months of November, December, and January. SBC's reported passing rates are shown below:

June – September 1999 Tier 2 Disaggregated Data

Month	June	July	August	September	Average June- Sept.
Tier 2 pass rate ⁶	88.4	88.8	88.5	87.1	88.2

November 1999 – January 2000 Tier 2 Disaggregated Data

Month	November	December	January	Average Nov.- Dec.
Tier 2 pass rate ⁷	83.9	82.7	82.9	83.2

In each month's data reported since December 16, 1999, SBC has reported failure on more than 15% of the “most critical, customer and competition-affecting measures,” when these Tier 2 measures are reported on a geographically disaggregated basis.⁸

⁶ Source: SBC CLEC Online Performance Measurement Results – Nov. 1999 updated files (<https://clec.sbc.com/>). Texas Staff provided the TPUC with an analysis of Tier 2 performance through September for the TPUC's November 4, 1999 Open Meeting. Staff reported slightly lower Tier 2 pass rates (June 87.1, July 87.6, August 86.9, September 87); the data reported above are based on subsequent “corrections” by SBC to its reported data. The 2-out-of-3 month figure for June-August is taken from Staff's evaluation. SBC also reported October 1999 data in late November, with an 86.2% pass rate for Tier 2 measures, but no update of the Staff's Tier 2 analysis was provided or addressed at the December 16, 1999 meeting to account for October performance.

⁷ SBC 2/18/00 ex parte, Hit or Miss Report (disaggregated) at 34.

⁸ The results vary slightly depending on whether geographically disaggregated or statewide data are examined. A number of factors may explain the difference. Statewide data may include measures for which 10 data points do not exist under the disaggregated data. In addition, provisioning and maintenance measures, which are separately reported for four geographic areas in Texas, count 4 times each in the disaggregated data, and only once in the statewide data. Whether examined on a statewide or disaggregated basis, the data show an unacceptable number of violations and deteriorating performance.

SBC's January 2000 Statewide Performance Across All Measures Was Its Worst In Six Months

Taking account of all of SBC's measurements – Tier 2, Tier 1, and diagnostic – a universe that SBC has referred to increasingly given its poor performance on the critical Tier 2 measures⁹ -- January 2000 was SBC's worst month of the last six, and perhaps ever. According to SBC's ex parte filings, SBC has fallen from an August 1999 passing rate of 87.2% of its total measurements, reported on a statewide basis, to a January 2000 passing rate of 81.4%.¹⁰ On the geographically disaggregated basis required under the Texas PM business rules, SBC violated parity and benchmark standards on more measures than ever before in January 2000 – 123 out of 774 measurements.¹¹

SBC's Post-Application Data Shows Deteriorating Performance Even Using SBC's Lenient "Overall Result" Calculation

SBC's approach to its deteriorating performance is not to try to improve that performance, but to look at the data in ever more forgiving ways. Thus, SBC's "Hit or Miss Reports" in its ex parte submittals calculate an "overall result" by looking at the results for each individual measurement, determining whether that measurement showed a passing z-score in 2 of the last 3 months, and then calculating the percentage of measurements that passed this 2-out-of-3 month test.¹² On this basis, SBC claimed that its data for August through October 1999 revealed that SBC had been in parity for 2 out of 3 months for 92% of *all* the performance measurements – Tier 1, Tier 2, and diagnostic. Dysart Aff. ¶ 79.

SBC's latest approach to calculating an "overall result" does not satisfy the statutory nondiscrimination requirement. SBC's approach permits it not only to violate

⁹ See, e.g., Dysart Aff. ¶ 79.

¹⁰ SBC February 11, 2000 ex parte – Hit or Miss Report August through October 1999 (statewide); SBC February 18, 2000 ex parte – Hit or Miss Report November 1999 through January 2000 (statewide). These data are illustrated in Attachment 1, Slide 3.

¹¹ SBC February 18, 2000 ex parte – Hit or Miss Report November 1999 through January 2000 at page 34 (geographically disaggregated). As this report shows, SBC reported z-scores on 21 more measures in January 2000 than in December 1999 (an increase from 753 to 774), at the same time reporting 20 more violations (increasing from 103 to 123).

¹² See, e.g., SBC February 18, 2000 ex parte – Hit or Miss Report November 1999 through January 2000 (statewide) at p. 10 (reporting "overall result" for Tier 2 measures, November through January, of 79.6%. The correct (and non-dilutive) approach under the TPUC standard would be to determine whether SBC met the 90% test in each of the 3 months examined, and then determine whether it met the 90% threshold in two out of three of those months. In contrast, SBC's "overall" 2-out-of-3 month test introduces yet more undue laxity into the examination of SBC's performance data.

parity or benchmarks on every single measurement at least one month in three, but SBC now grants itself the further benefit of compliance on the less important diagnostic measures that SBC has itself identified as redundant.¹³

Even under this extra-forgiving test, SBC can no longer claim a 90% pass rate. Rather, SBC reported an "overall result" for all measures, geographically disaggregated, for the months of November 1999 through January 2000, of 88.3%. Moreover, SBC's statewide data for the "most critical, customer and competition affecting" Tier 2 measures show a sharp drop between the "overall result" in SBC's performance data for the three months ending October 1999, the primary set of data relied upon in SBC's application, and the "overall result" for the most recent three months shown in SBC's post-application data. SBC reported passing 86.7% of its Tier 2 measures (statewide) in two out of the three months ending October 1999.¹⁴ By January 2000, SBC's "overall result" on Tier 2 measures statewide had fallen from 86.7% to 79.6%.¹⁵ In sum, even if SBC's commercial performance data were reliable – and AT&T, other CLECs, and now the Justice Department have demonstrated it is not – they could not demonstrate compliance with the competitive checklist.¹⁶

The Post-Application Data Refute Explanations of Poor Performance Offered in SBC and TPUC Reply Comments

SBC's post-application data – in particular, its reports of January 2000 performance – undercut several of the explanations and interpretations by which SBC and the TPUC seek to explain parity and benchmark violations in such key areas as access to DSL-capable loops, UNE loop coordinated conversions, billing, and interconnection trunking.¹⁷ Because the January DSL data offer particularly striking examples of

¹³ See Pfau/DeYoung Decl. ¶ 84, n. 98.

¹⁴ This percentage is calculated from the list of "hits" and "misses" reported for Tier 2 measures in the SBC February 11, 2000 ex parte Hit or Miss Report August through October 1999 (statewide).

¹⁵ SBC February 18, 2000 ex parte, Hit or Miss Report November 1999 through January 2000 (statewide) at 10.

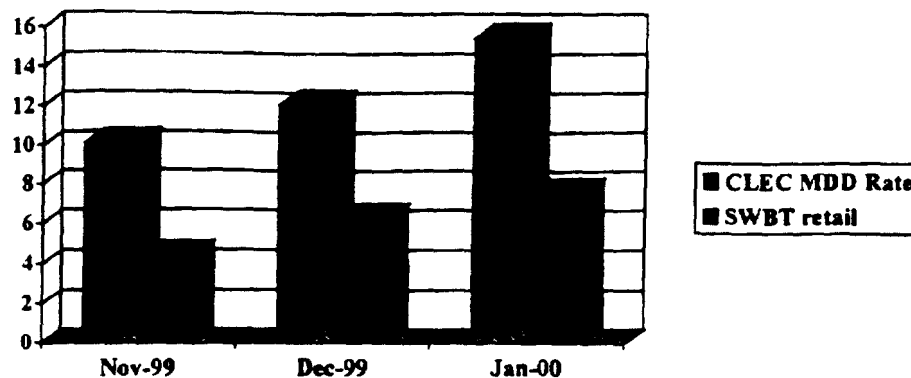
¹⁶ For a list of issues that raise questions about the reliability of SBC performance data, see Pfau Reply Decl. at Attachment I. The Justice Department has concluded the evidence of unreliability in SBC data in certain areas "may be symptomatic of more serious problems in the reliability of SBC's performance measurement systems and processes." DOJ Evaluation at 17.

¹⁷ Both SBC and the TPUC reply comments present new factual claims and data analysis that go beyond the record in the state proceedings and that in any event could have been presented with the application or initial comments, so that all parties might have had fair opportunity to address them. The TPUC's analysis of the DSL issues is particularly troubling in this regard. The TPUC's affiant acknowledges that its initial comments "did not include all the details concerning the [DSL] performance data reconciliation undertaken in November and December 1999." Therefore, he proceeds to "elaborate" on a confidential data reconciliation process in a reply affidavit, effectively foreclosing rebuttal. Reply Affidavit of Nara V. Srinivasa ¶ 9 (hereafter "TPUC Reply Aff."). Further, the TPUC's reply comments on DSL largely consist of its description of a "recent, further review performed by the TPUC since the

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disparities between SBC's performance for CLECs and for its retail service that go beyond the explanations offered by SBC and the TPUC, that data is discussed below.

Missed Due Dates. January 2000 represented the fifth consecutive statewide parity violation that SBC has reported on PM 58, % SBC caused missed due dates, for DSL loops. The disparity between the higher missed due date rate that SBC reports for CLECs and the rate it reports for its retail service is increasing, as the following chart of SBC's performance for November 1999 – January 2000 illustrates:¹⁸



Thus, in January 2000 SBC reported a missed due date rate of 15.5% for CLECs in provisioning these loops, more than double the 7.6% rate SBC reported for itself. SBC's chronic failure on PM 58 for DSL loops is significant, with this measure capturing an order of magnitude more DSL transactions than the DSL installation interval measure, PM 55.1.¹⁹

SBC and the TPUC seek to explain away these missed due date parity violations by pointing to SBC's repeated parity violations on another measure, missed due dates due to lack of facilities. Dysart Reply Aff. ¶ 31; TPUC Reply Aff. pp. 12-13. However,

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submission of its initial Evaluation" TPUC Reply Comments at 2 (February 22, 2000). Allowing the state commission, or any participant, to offer this sort of *post hoc* analysis would eviscerate what little seems to remain of the "complete when filed" rule. SBC's performance in providing access to DSL capable loops should have been developed on the record in the state proceedings, in data that could be scrutinized on the public record. Instead, this Commission is left to evaluate the TPUC's confidential examination of limited data from three CLECs (data that was hastily assembled at TPUC request when SBC's own data and Telcordia testing proved inadequate), an examination that has not been "elaborated" on the public record until the reply comment stage of proceedings here.

¹⁸ SBC February 18, 2000 Ex Parte Hit or Miss Report – November 1999 through January 2000 (statewide) at p 6.

¹⁹ See Pfau Reply Decl. at ¶ 13 and n. 14.

parity violations on these two measures do not somehow cancel one another out. The TPUC established each measure as an independent, relevant test of SBC performance, providing that PM 60 (missed due dates due to lack of facilities) would be subject to Tier 1 liquidated damages payments, separate and apart from PM 58, which is a Tier 1/Tier 2 measure.

It is deeply ironic that both SBC and the TPUC respond to the absence of parity by pointing to the fact that SBC provides DSL service over the same line used for voice, while CLECs have ordered a second line. That is not an excuse for discrimination, but rather the explanation that discrimination is present. SBC refuses to implement line sharing, and it refuses to permit CLECs to provide both voice and data service in a nondiscriminatory manner. See AT&T Ex Parte Letter from James Casserly to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-4 (March 3, 2000). In all events, if SBC's current performance on these missed due date measures for itself and its performance for CLECs cannot be regarded as comparable for the reasons stated by SBC, then these measures are lacking essential benchmarks. Certainly there is no basis on this record for concluding that missing CLEC due dates at a rate that has grown from 10.1 to 15.5% over the past three months is providing them with a meaningful opportunity to compete in deploying advanced services.²⁰

SBC's DSL performance data in particular should be construed strictly, with little latitude for *post hoc* rationalization. SBC's current DSL measures are not the product of the same collaborative process that produced other Texas measures. The DSL measures and disaggregations included in the current set of measures were adopted by the TPUC based on unilateral proposals from SBC. Indeed, the Commission instructed CLECs that they need not comment on DSL measures as part of developing version 1.6 of the business rules, because Texas DSL measures would be developed after the arbitration award was issued in the DSL Arbitration between SBC and Covad, Northpoint and Rhythms.²¹ Even the TPUC acknowledges that the DSL performance measures "will be

²⁰ Nor can SBC point to its performance in provisioning DSL loops for its retail service as a basis for asserting that it is providing CLECs with nondiscriminatory access to the entirely different category of DSL-capable loops. By SBC's testimony here, it is providing DSL service by "line sharing" with itself over the same 8 dB POTS circuits used to provide voice service. Dysart Reply Aff. ¶ 31. Once SBC began to deploy its own DSL retail services, reference to performance provisioning DSL loops could not satisfy its obligation to provide CLECs nondiscriminatory access to DSL-capable loops.

²¹ When deadlines were set for submission of comments on version 1.6 of the business rules, CLECs who were not participants in the DSL arbitrations raised the question of when comments on DSL measurements would be due. TPUC Project Nos. 16251, 20000, Tr. at 172 (September 8, 1999). Noting that the DSL performance measurements were tied to a 30-day completion date following the arbitration award, the Administrative Law Judge directed that "it's not necessary that those be addressed within the same time frame that we're addressing right now. I think we can set time frames once the arbitration award is out" *Id.* at 173. Proceedings to develop those measures have only recently begun in the DSL arbitration docket. The proposals submitted by the data CLECs in that arbitrations last week would modify the Texas measures to consistently require SBC to demonstrate that its service to CLECs is at parity with the service provided by its retail affiliate (or any retail service provided directly by SBC). AT&T has sought to have the performance measure proceedings in that docket opened to broader participation by Texas CLECs. TPUC Docket Nos.

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revised, tested and validated through the award implementation process." TPUC Reply Comments at 2. Until proper DSL measures have been "revised, tested and validated," this time with meaningful opportunity for CLEC input, SBC is left at this Commission with a record that consists of chronic, significant parity violations under measures that SBC itself designed.²²

Maintenance and Repair of DSL loops. SBC's January 2000 data also contradicts the TPUC's conclusions regarding SBC's performance on DSL maintenance measures. The TPUC, looking at data through December, takes the view that SBC performed better than or close to parity for three out of four months. TPUC Reply Aff. at 20. The TPUC apparently did not regard it as significant that the one month of failure was the one with by far the greatest number of CLEC DSL loops in service (974, compared to 515 in November and below 200 before that). *See id.* On that volume, the trouble report rate for CLEC DSL loops grew to 7.7% from the 4% range it had been in during October-November, and now significantly exceeded SBC's 4.6% retail rate, producing a parity violation ($z = 4.3$). *Id.* January 2000 was SBC's second consecutive statewide parity violation on this measure, with a trouble report rate of 6.3% for CLECs compared to 4.7% for SBC retail.²³

The TPUC also purports to excuse SBC's parity violations on trouble report rate (PM 65) based upon SBC's performance on PM 67 (average time to clear trouble). TPUC Reply Aff. at 21. Although AT&T acknowledges the importance of prompt repairs, CLECs still are subject to competitive harm when their customers experience more frequent troubles than SBC retail customers. In any event, the TPUC's reliance on PM 67 performance is misplaced.

The TPUC noted that in December SBC required almost an hour longer to clear CLEC troubles than retail troubles on DSL loops (13.38 and 12.56 hours, respectively). *Id.* That difference was not sufficient to create a parity violation at the 95% confidence level. However, the fact that CLEC troubles required at least as long to clear as SBC retail troubles (and, in fact, somewhat longer) reinforces, rather than offsets, SBC's poor

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20226, 20272, Project No. 16251, AT&T Communications of Texas, L.P.'s Letter Establishing Procedures For Review Of DSL Performance Measurements (February 24, 2000).

²² Indeed, SBC's motion for rehearing in the DSL arbitration, filed this week, shows SBC's belief that the proper remedy for its failure to meet a benchmark is to change the benchmark. SBC seeks rehearing of the ruling that it return loop make-up information within a three business day interval (as well as provide parity with its retail service). SBC protests the three business day interval specifically because January 2000 data show that SBC was not able to meet that interval and because "SBC is concerned that its performance in January and later months could become a basis for a complaint under the approach of the Arbitration Award." TPUC Docket Nos. 20226, 20272, Southwestern Bell Telephone Company's Motion For Rehearing 4-5 (February 29, 2000).

²³ SBC February 18, 2000 ex parte, Hit or Miss Report November 1999 through January 2000, p. 7.

performance on the trouble report rate measure, PM 65. Further, the TPUC's perspective caused it to overlook a serious December parity violation on this measure in the Dallas/Fort Worth area, where SBC averaged restoring service on CLEC DSL loops in 15.68 hours compared to 5.23 hours for its retail service.

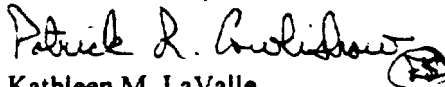
In January 2000, SBC's difficulties restoring service for CLEC DSL loops resulted in a statewide parity violation on PM 67. SBC's mean time to restore service for CLECs was 15.3 hours, compared to 8.4 hours for its retail operations, resulting in a z-test violation ($z = 3.94$).²⁴ Considered together, SBC's performance on PM 65 and 67 through January 2000 present an increasingly clear picture of inferior maintenance for growing volumes of CLEC DSL loops, compared to the maintenance SBC provides for its retail service.

Conclusion

Checklist compliance in these proceedings should be determined, so far as commercial performance data is concerned, on the basis of the data that was available at the time of SBC's application – November 1999 data that had been reported late in December. SBC's unending proffers of new data, restated old data, and controversial explanations of bad data, with no opportunity for meaningful resolution of factual disputes, should be rejected. SBC's position in this proceeding -- that the Commission should accept all of its compliant self-reported data without further inquiry or question, and at the same time accept every conceivable excuse it offers for its non-compliant data -- is untenable, particularly in light of the overwhelming evidence that SBC's data is unreliable. To the extent that post-application performance data is entertained, it should be given its plain meaning – SBC is committing too many parity and benchmark violations, including at least one in five of its most critical measures, to be considered in compliance with the Act.

Very truly yours,

Cohan, Simpson, Cowlshaw
& Wulff, L.L.P



Kathleen M. LaValle
Patrick R. Cowlshaw

Enclosures: Attachment 1

cc: D. Atwood
K. Dixon
J. Goldstein

²⁴ SBC February 18, 2000 ex parte, Statewide Hit or Miss Report at 7 (line 67.08).

H. Walker
S. Whitesell

W. Agee
R. Atkinson
C. Blue
M. Carey
W. Dever
J. Jennings
J. Rosenworcel
D. Shiman
J. Stanley
L. Strickling
A. Wright